IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELATE JURISDICTION

CRIMINAL APPLICATION NO.5328 OF 2003

Mrs.Saroj Mulchand Motwani. ...Applicant.

V/s.

1. Shri arihant Co-operative Bank Ltd. & Ors. ...Respondents.

Mr. Rajesh V. Sipahimalani h/f Mr. V.T. Sipahimalani, Advocate for the Applicant.

Mr. H.S.Murthi with Mr.Prakash Shenoy Advocate for Respondent No.1.

Mr. B.H.Mehta, APP.

CORAM: A.S.AGUIAR,J

DATE : 27TH AUGUST,2004.

P.C. :-

1. The Applicant challenges the order dated 11th July, 2003 passed by the learned Chief Metropolitan Magistrate in case No.66/Misc/2003 and prays for quashing the same. By order dated 11th July, 2003, the learned Chief Metropolitan Magistrate allowed the application of the respondent

Co-operative Bank Ltd. and directed the Assistant Registrar of the Court after issuing notice of taking possession of the secured assets being flat 302, on the third floor of the building known as ‘Jyoti Apartments’, Tupe Wadi, V.P.Road, Mulund(west),Mumbai to the mortgagors and giving a reasonable period of not more than 15 days to hand over possession, to take possession of the above flat alongwith the documents relating thereto. The applicant impugns the said order of the Chief Metropolitan Magistrate interalia on the ground that the said order is based on an erroneous finding that the applicant had executed a deed of equitable mortgage in respect of the residential flat and as such the same is a ‘secured asset’ liable to be attached and possession taken under Section 14(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. (hereinafter referred to as ‘the said Act’) It is pointed out that the Chief Metropolitan Magistrate had not given notice to the applicants before embarking on an enquiry to ascertain whether the flat in question was a secured asset or not. It is contended that issue of the said notice to the applicant is implicit in Section 14 of the said Act. It is further submitted that the said order of the Chief Metropolitan Magistrate being an exparte order is in violation of principles of natural justice and therefore, seriously prejudicial to the applicant. It is further contended that the Lower court failed to appreciate the

import of letter dated 11/7/2001 Exh.D herein of Respondent. It is submitted that no equitable mortgage is created in respect of the flat with respondent No.1 Bank as is manifest from the letter dated 11/7/2001 Exh.D in the petition. It is also submitted by the applicant that the respondent No.1 bank has got a lien on the flat and the same is marked in the records of the society and therefore, provisions of the Securitisation Act are not applicable in view of the Section 31 of the said act. Section 31 of the Said act reads as follows:

> **31. Provisions of this Act not to apply in certain cases:** The provision of this Act shall not apply to -
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> (a) a lien on any goods, money or security given by or under the Indian Contract Act, 1872 or the Sale of Goods Act, 1930 or any other law for the time being in force.

2. The Respondent No.1 bank has approached the Chief Metropolitan Magistrate for taking possession of the flat in question under the provisions of Section 14 of the said Act. Prior to that notice was given to the applicant under section 13(2) and 13(4) of the said Act. The notice under Section 13(2) is dated 25/2/2003 and notice under section 13(4) is dated 26/6/2003. Section 13(1),13(2) and 13(4) of the said act reads as follows:

"13. Enforcement of security interest :- (1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882(4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

(3) ......

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section(2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

3. The applicant had replied to the notices under section 13(2) and 13(4) by letters dated 1st April, 2003, 23rd April, 2003 and 1st July, 2003 (Exh. 64,65 and 66.) contending that since the matter is pending before the Co-operative court, no action could be taken by Chief Metropolitan Magistrate and no application could be filed in Chief Metropolitan Magistrate's Court unless the Co-operative Court which was seized of the matter declared the flat to be a secured asset. No reply was received from the Respondent No.1 nor did respondent No.1 give the applicant inspection of the relevant documents. Despite this petition, the respondent No.1 went ahead and filed the application before the learned Chief Metropolitan Magistrate under Section 14 of the said Act which reads as follows :

> **14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.** - (1) Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate

> shall, on such request being made to him-
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> (a) take possession of such asset and documents relating thereto; and
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> (b) forward such assets and documents to the secured creditor.
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> (2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate of the District Magistrate may take or cause to bed taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.
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> (3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority."

4. the contention of the learned Advocate for the applicant is twofold. (1) that the flat is not a secured asset and therefore, the provisions of the Securitisation Act cannot be invoked (2) That the order passed in the application before the Chief Metropolitan Magistrate is an exparte order as no notice was given to the applicant and the applicant was not heard before the passing of the order. On the other hand, it is the contention of the learned advocate for the respondent bank that Section 14 of the said act does not contemplate giving any notice of hearing to the guarantor/borrower and that the learned Chief Metropolitan Magistrate was duty bound on request

being made by the secured creditor to take possession of such asset and documents relating thereto, and to forward such assets and documents to the secured creditor. For the purpose of securing compliance with the provisions of sub-section (1) the Chief Metropolitan Magistrate or District Magistrate may take steps and use such force as may, in his opinion be necessary. No act of the Chief Metropolitan Magistrate or District Magistrate done in pursuance of this section can be questioned before any authority.

5. Subsequent to the passing of the order, the applicant applied for recalling of the order by his application dated 31st July, 2003 which is at Exh.C to the petition, taking up the contention that the flat is not a secured asset in view of section 31 of the said Act since there is a lien created on the said flat and that this aspect has been suppressed and not brought to the notice of the court. Notice of the said application was given to the respondent bank which was represented at that stage and thereupon the order dated 22nd December, 2003 came to be passed rejecting the application of the respondent No.3 i.e. applicant herein. By his said order, the Chief Metropolitan Magistrate vacated the stay granted earlier and further directed the Assistant Registrar to act upon the order dated 11.7.2003 by following the procedure as laid down in the said order. The learned Chief

Metropolitan Magistrate also observed that the bank had produced memorandum of entry of equitable mortgage and declaration made by respondent No.3 Applicant herein dated 9/4/1997 and Irrevocable general power of attorney of the same date in favour of the bank. In view thereof, the learned Chief Metropolitan Magistrate came to the conclusion that the flat was a secured asset. The learned Chief Metropolitan Magistrate while rejecting the application observed that the remedy for the Applicant was by way of an appeal under section 17 of the said Act. Section 17 reads as follows :

> **17. Right to appeal.** - (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may prefer an appeal to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken.
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> (2) Where an appeal is preferred by a borrower, such appeal shall not be entertained by the Debts Recovery Tribunal unless the borrower has deposited with the Debuts Recovery Tribunal seventy five per cent. of the amount claimed in the notice referred to in sub-section (2) of section 13:
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> Provided that the Debts Recovery Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.
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> (3) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be,

> dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder."

5. Although the Applicant had a remedy by way of appeal before the Debt Recovery Tribunal in respect of action taken under Sec.13 of the Act. She failed to avail of the same. However, the learned Advocate for the applicant states that he has approached this Court under Section 482 of the Cr.P.C. as no action of the Chief Metropolitan Magistrate can be called in question under sub-section 3 of section 14 of the said Act and since he has no remedy by way of appeal from the order of the Chief Metropolitan Magistrate he has approached this court under section 482 of the Cr.P.C. However attention is drawn by the learned advocate for the Respondent No.1 to the Judgment of the Supreme Court in case of **Mardia Chemicals Ltd. V/s.Union of India reported in AIR 2004 SUPREME COURT 237**1. Wherein it is observed as follows :

> 80. Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under section 13(1) of the Act have been taken, a mechanism has been provided under section 17 of the act to approach the Debt Recovery Tribunal. The above noted provisions are for the purposes of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the act,s is as follows :-

> 1. Under sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days notice before proceeding to take any of the measures as provided under sub-section (4) of section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information/-knowledge of the borrower without giving rise to any right to approach the Debt Recovery Tribunal under Section 17 of the Act, at that stage.
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> 2. As already discussed earlier, on measures having been taken under sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under section 17 of the Act before the Debt Recovery Tribunal."

Thus it is clear that the remedy by way of appeal to the Debt Recovery Tribunal under Section 17 of the Said Act was open to the Applicant. However, the applicant has chosen not to approach the Tribunal and instead approached this Court to decide the rights of the Applicant as Guarantor on merits. No action has been taken so far for attachment or sale of flat although the Chief Metropolitan Magistrate has

by his order dated 22nd December, 2003 vacated the stay on sale of the flat. This Court by its order dated 26/12/2003 granted stay of the order of the Chief Metropolitan Magistrate dated 30/8/2003. The said stay was continued from time to time till date.

6. Since the applicant has chosen not to avail of the right of appeal before the Debt Recovery Tribunal and instead approached this Court under section 482 Cr.P.C. this Court is required to dispose of the application on merits. The main contention of the applicant is that the flat is not a secured asset in view of the lien created on the same in favour of the bank and therefore hit by section 31. There is no substance in the submission for the reason that the applicant has in fact created an equitable mortgage by depositing title deed in respect of the flat with the bank. The documents of title are shares certificates and agreement for sale of the flat and a declaration of the guarantor prima facie establishing that the flat is a secured asset. The procedure adopted by the respondent bank under the provisions of the Securitisation Act is therefore justified and it was incumbent on the Applicant to adopt the remedy provided under the said Act which he failed to do.

7. The next contention of the applicant is that he is not heard on merit on the application under section 14.

This submission also is without force as it was not necessary for the Chief Metropolitan Magistrate to hear the applicant before passing the order. Nevertheless the Chief Metropolitan Magistrate entertained and heard the Applicant on her application filed subsequent to passing of the impugned order. This order passed on merits is not challenged nor referred to or relied upon in the present application. Hence I see no reason to interfere with the said order of the Chief Metropolitan Magistrate.

8. In the circumstances, application rejected. Application disposed of. On application of the learned advocate for the applicant, this order is stayed for a period of four weeks.

(A.S.AGUIAR,J)